IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLANT, SWIFT & COMPANY.

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INDEX.

CASES CITED.

Statutes Cited.

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PRELIMINARY EXPLANATIONS.

Terms and Symbols Used Herein.

R. .... refers to pages of the printed transcript of record in this Court.

Ex. .... refers to exhibits as numbered in proceedings before the Interstate Commerce Commission in its docket No. 28714.

The New York Central Railroad Company is referred to herein as *New York Central*, and such reference will also include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

The Cleveland Union Stock Yards Company will be referred to herein as the *Stock Yards*.

The Act refers to the Interstate Commerce Act.

Commission refers to the Interstate Commerce Commission.

Appendix.

For the convenience of the court, we have included certain matters in an appendix hereto.

Appendix "A" includes: (1) the sections of part I of the Interstate Commerce Act upon which the Commission based its decision; and (2) section 2 of the Elkins Act.

Appendix "B" is a sketch taken from exhibit 12, showing approximately the track layout and the location of the various industries involved, including the Swift plant.

Appendix "C" is a photographic reproduction of a printed copy of the Commission's decision.

REFERENCE TO OFFICIAL REPORT OF OPINION OF LOWER COURT AND REPORT OF INTERSTATE COMMERCE COMMISSION.

1. Reference to official report of the opinion of the lower court is as follows:

Baltimore & O. R. Co., et al. v. United States, et al.; and *Cleveland Union Stock Yards Co. v. United States, et al.*, 71 F. Supp. 499.

2. Reference to the report of the Interstate Commerce Commission is as follows:

Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The grounds on which the jurisdiction of this court is invoked were set forth with particularity in appellants' jurisdictional statement under rule 12 of the Revised Rules of this court. Briefly stated, these grounds are as follows:

In its docket No. 28714, *Swift & Co. v. Baltimore & O. R. Co., et al.*, the Interstate Commerce Commission, on May 3, 1946, issued its report and order, making findings under and construing sections (among others) 1(3)(a); 1(6); 1(9); and 3(1) of the Interstate Commerce Act; and ordered the defendants therein to cease and desist from refusing to deliver interstate shipments of live stock to the sidetrack of Swift & Company, the complainant therein; and ordered defendants to publish appropriate schedules providing for such delivery as required by section 6 of said

act. The effective date of the Commission's order has been postponed from time to time, pending the filing and final disposition of actions in court attacking the validity of the order. Various defendants against which the order ran filed two separate actions in the District Court of the United States for the Northern District of Ohio, Eastern Division, in which they asked that the Commission's order be held illegal and void and that it be suspended, set aside, vacated, cancelled, and held for naught, and that enforcement thereof be perpetually restrained and enjoined. Swift & Company intervened under U. S. C. title 28, section 45a. The different court actions were consolidated for trial and heard by a special three-judge court as required by law. That court, in its order and judgment, perpetually enjoined enforcement and vacated, set aside, and annulled the Commission's order.

As was pointed out in our jurisdictional statement under this court's rule 12 and as this court will readily see when it reads other portions of these briefs, the questions presented by this appeal are substantial and involve the interpretation and application of a number of sections of the Interstate Commerce Act as well as a section of the Elkins Act.

It is respectfully submitted that this appeal from the aforesaid order of the United States District Court was properly filed and that the jurisdiction of this court is properly invoked under U. S. C. title 28, section 47a, 41(28), 44, 47, and 345, as said sections have been amended from time to time.

QUESTION TO BE DECIDED.

The question to be decided is whether a common carrier by railroad, subject to the Interstate Commerce Act, which uses as a part of its terminal facilities in Cleveland, Ohio, 1619 feet of track leased by it from the Cleveland Union Stock Yards Company, may violate the duties with respect to the delivery of freight imposed upon the carrier by the Interstate Commerce Act, because the lessor of the track, Cleveland Union Stock Yards Company, demands such violation of law by the lessee railroad common carrier.

STATEMENT OF THE CASE.

At Cleveland the main line of the New York Central Railroad Company (one of the plaintiffs in No. 24435) runs approximately east and west along the northern boundary of the property of the Cleveland Union Stock Yards Company (Ex. 12 and 13). Leading off from this main line is a track known as spur track No. 245, of which the initial 132 feet is owned and operated by the New York Central (Ex. 9; R. 340). This track then continues in a southerly direction through the stock yards property a distance of 1619 feet, this 1619 feet of the track being owned by the Stock Yards Company but maintained by the railroad company without charge against the Stock Yards Company (R. 232; Ex. 9, R. 340). This track is referred to in the lower court's opinion and in the Commission's decision as track 1619 and, for convenience, we will use the same designation. The southerly end of track 1619 again connects with tracks (about 793

feet) which are owned by the New York Central; and these New York Central tracks connect with sidetracks which serve seven industries (Earl C. Gibbs, Inc., Kreinberg & Krasny, Standard Beef Company, Hughes Provision Company, Koblenzer Brothers, Theurer-Norton Provision Company, and Swift) (Ex. 12 and 13; R. 243-4). The tracks owned by the New York Central, as well as that portion of the track leased from the Stock Yards Company, are a part of the Cleveland terminal facilities of the New York Central and afford the only rail connection between the seven industries named and any rail line leading to Cleveland (R. 244).

For many years (1910 to the present time) the New York Central and its predecessor provided by tariff for receipt and delivery of all classes of railroad traffic, including live stock, over these sidetracks connected with the track of the New York Central at the southern end of the stock yards which, in turn, connected with the track leased from the Stock Yards Company and maintained by the railroad company (R. 206-7 and 241). The tariff of the New York Central has continuously provided for such delivery (R. 207-8). Said industries, including that of Swift, are not served directly by the track owned by the Stock Yards Company, but by tracks generally owned by the respective industries and connected directly with the tracks owned by the New York Central, which intervene between said industries and the 1619 feet of track leased by the New York Central from the Stock Yards Company. As stated, these industries have no other rail connections (Ex. 12; R. 243-4).

The history of the construction of track 245 and various industrial sidetracks connecting therewith and the facts which led up to the proceeding before the Commission are stated in detail at pages 56-62 of the Commission's decision (appendix "C") (R. 29-35). Suffice it to say that in

May, 1899, the predecessor railroad company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, entered into a contract with the Stock Yards Company for the construction of certain tracks upon the property of that company (Ex. 14; R. 347-350). The contract provided that the Stock Yards would bear the cost of constructing said sidetracks and thereafter would bear the maintenance cost of said tracks. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The record does not make clear just what transpired with respect to all of these tracks between May, 1899, and 1924, but a copy of an agreement of June 16, 1924, between the railroad company and the Stock Yards Company (Ex. 9; R. 339-341) indicates that the railroad had taken over the ownership of most of the tracks originally constructed upon the stock yards property, but not including the 1619 feet of track here involved.

Paragraph Fourth of said agreement of June 16, 1924, (Ex. 9; R. 340) provided that thereafter the railroad company would bear the cost of maintenance of all the tracks upon the property of the Stock Yards Company without expense to the Stock Yards Company. This provision covers not only the 1619 feet of track involved but all of the other private tracks of the Stock Yards Company. This contract provided for the free and uninterrupted use by the railroad of any and all tracks or portions thereof belonging to the Stock Yards Company and located upon its land, but it did not provide that railroad use of the track should not interfere with the Stock Yards business.

Effective February 1, 1935, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," which was construed by the Stock Yards and the railroad to mean live stock, "a charge for

which use shall be the subject of a separate agreement" (Ex 31; R. 423-4; 266 I. C. C. 55, 57-58; Ex. 9, R. 338). The parties were unable to agree (Ex. 48; R. 437). The railroad defendants discontinued deliveries of live stock to the Swift sidetrack By letter of August 14, 1941, Swift demanded that the line-haul carriers deliver live stock to its siding, and this demand was refused (Ex. 4 and 5; R. 317, 318, and 212). Thereafter the New York Central cancelled its switching charge which had covered delivery by the New York Central to the Swift plant of live stock reaching Cleveland over railroads other than the New York Central, thus leaving it without any lawful tariff publication to cover such service with respect to shipments originating on the Pennsylvania and other railroads (R. 207; Ex. 2; R. 310 and 312). The New York Central, however, never changed its tariff so as to eliminate deliveries to the Swift plant of shipments reaching Cleveland via the New York Central as the line-haul carrier. As the Commission states (p. 60) (R. 33), "On such traffic the tariffs of that carrier (New York Central) provided, and still provide, for delivery to complainant's (Swift's) siding at the line-haul rates to Cleveland."

From at least 1910 until 1938 the railroad tariffs had provided for and Swift had the right to receive so-called direct shipments of live stock, purchased at other points and billed to its Cleveland plant via lines other than the New York Central, by switch track delivery to its plant (R. 241-2), and the New York Central tariff continues that right to this time upon shipments arriving via that railroad (R. 208-9). After the demand upon the railroads for resumption of such delivery and their refusal, Swift filed its complaint before the Commission alleging violation of various provisions of the Interstate Commerce Act and asking for the entry of an order affording appropriate re-

lief. In this connection it is well to note the care and attention which was given by the Commission to this proceeding.

The Swift complaint was filed with the Commission in September, 1941 (R. 28). It came on for hearing at Cleveland, Ohio, on April 22, 1942, before an examiner of the Commission, Mr. Paul O. Carter (R. 203). A proposed report was issued by Examiner Carter and served upon the parties in April, 1943. Oral argument was had before the entire Commission on June 4, 1943 (R. 465). By order of the Commission (on its own motion) of June 14, 1943, the case was reopened for further hearing and consideration. It was assigned for further hearing at Cleveland, Ohio, on June 22, 1944, before an examiner of the Commission, Mr. T. Leo Haden. At that hearing further evidence was taken (R. 235), and briefs were filed in October, 1944. In May, 1945, a proposed report was issued by Examiners T. Leo Haden and A. J. Banks. The case was again argued before the Commission by counsel for all parties on October 3, 1945 (R. 502). It was thereafter decided by the Commission on May 3, 1946 (R. 28), and the Commission at that time entered its order to be effective August 30, 1946 (R. 157). In the latter part of June, 1946, the Cleveland Union Stock Yards Company filed with the Commission its petition for reconsideration. Swift filed a reply to said petition, dated July 23, 1946. Thereafter the railroad defendants before the Commission filed with the Commission a petition for reconsideration, etc., dated August 4, 1946 (R. 571). Swift filed a reply to said petition, dated August 31, 1946 (R. 600). These petitions and replies were considered by the Commission and said petitions were denied by an order of the Commission of October 7, 1946. Thereafter the two separate complaints in No. 24435 (R. 4 *et seq.*) and No. 24479 (R. 88 *et seq.*) were filed in the United States District Court for the Northern District of Ohio for the purpose of enjoining the Commission's order.

Swift & Company intervened in the District Court cases. Answers were filed. Briefs were filed. A special three-judge court was convened to hear and decide the cases. Oral argument was had, and the cases were submitted. The court filed its opinion (R. 148). After receiving suggestions from the parties, the court entered its findings of fact and conclusions of law (R. 178). On May 14, 1947, the court entered its final order and judgment enjoining the Commission's decision (R. 190). Thereafter this appeal was taken to this court by appellants herein.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

This appellant intends to urge each of the assigned errors.

ARGUMENT.

I.

The District Court Erred in Finding That Track 1619 Is Not Part of the New York Central Railroad Within the Meaning of Section 1 (3) (a) of the Act and Is Not as Much Subject to the Act and Its Provisions as Any Other Part of the Railroad or Facilities of the New York Central.

The first glaring error of the lower court was in its failure to give proper weight and consideration to and to apply properly section 1 (3) (a) of the Interstate Commerce Act. In its consideration of that section, the District Court erred unmistakably in substituting its judgment for that of the Interstate Commerce Commission with respect to matters which Congress has entrusted to the Commission alone.

It will be noted that the Commission, at pages 56 to 62 of its report, reviewed in detail the undisputed facts in connection with the construction of, agreements concerning, and use over the years of track 1619 and found as follows at pages 63-64:

> "Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes delivery and takes receipt of freight in performing its common-carrier switching

service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur does not alter the fact that the use it is making of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant."

At page 70 the Commission found:

"The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a)."

The lower court, on the other hand, undertook to reverse the finding of the Commission and, substituting its own judgment for that of the Commission, stated in its finding VII (R. 184):

"In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record."

In its conclusion of law IX (R. 187) the lower court said:

"There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant."

It will also be noted that the lower court, in its opinion (R. 149) and its finding III (R. 180), referred to the 1924 contract between the Stock Yards and the New York Central as a "private sidetrack agreement", although that contract gave the railroad free and uninterrupted use of track 1619 and provided for operation and maintenance by the railroad. Finding II (R. 180) refers to track 1619 as "one of these private switch tracks."

Scope and nature of Interstate Commerce Act.

It is elementary that the Act is remedial and imposes a comprehensive and integrated scheme of regulation.

In *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 618, 89 L. ed. 499, 507, this court said:

> "The 1940 Act was intended, together with the old law, to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers."

In *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361, 88 L. ed. 96, 101, this court said:

> "Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object, not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates."

From the time of its first enactment, a principal aim of the Act has been to "cut up by the roots every form of discrimination, favoritism, and inequality." *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478, 55 L. ed. 294, 297, 302; *O'Keefe* v. *United States*, 240 U. S. 294, 297, 60 L. ed. 651, 655. See also *New York* v. *United States*, ____ U. S. ____, 91 L. ed. 1083, 1090.

Extent of property, equipment, and facilities which Congress subjected to regulation under Act.

One of the first problems with which Congress must have been confronted in writing the Interstate Commerce Act is the extent to which the Act should be applicable to various kinds of property and facilities used by the railroads. It is fairly obvious that the effectiveness of the Act must depend upon broad application to all tracks and facilities used by the carriers in performing their common carrier function. Congress settled this problem by defining such terms as "railroad" and "transportation" in very broad terms in section 1 (3) (a) of the Act. For example, that section reads in part:

> "*The term 'railroad'* as used in this part *shall include* all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also *all the road in use* by any common carrier operating a railroad, *whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks,* terminals, *and terminal facilities of every kind used or necessary in the transportation of* the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (Emphasis supplied.)

Section 1 (1) of the Act, it will be noted, declares that the provisions of the Act shall apply to common carriers

engaged in the transportation of property by railroad. It cannot be denied that the railroad appellees are common carriers engaged in the transportation of property wholly by railroad.

At this point it is logical to consider briefly whether it was the function of the Commission or the lower court to find whether track 1619 comes within the definition of "railroad" in section 1 (3) (a).

Commission's finding binding on lower court.

It is obvious that in a situation of this kind it is proper for the Commission to find whether any particular track or facility under consideration comes within the statutory definition of "railroad". Also it is apparent that the combination of possible facts in connection with such tracks or facilities are kaleidoscopic and such as might tax the wisdom of a Solomon. It seems reasonable that members of an administrative agency who devote all of their working time to transportation problems would be in a better position to make findings in such cases than even the most astute judges who consider such matters only occasionally.

Certainly we should expect great weight to be given such findings by an agency charged with administering a comprehensive plan of regulation under an integrated act such as the Interstate Commerce Act where uniformity of application is desirable. A review of the authorities reveals that such questions are to be determined by the Commission rather than by the courts and that the Commission's findings will not be disturbed if supported by evidence.

United States v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186, involved a finding by the Commission as to what, in that case, was embraced within the term

"transportation" within the meaning of section 1 (3) (a). (It will be noted that exactly the same section of the Act was involved there as in the instant case and that the definition of "transportation" is in the same paragraph as the definition of "railroad.") This court there said (pp. 407, 408):

> "The statute contains this definition: 'The term "transportation" shall include * * * all services in connection with the receipt, delivery, elevation, and transfer in transit * * * of property transported.' The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of the provisions of this act,' to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist.
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> * * * * *
>
> The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it."

In *Interstate Com. Com.* v. *Hoboken Mfrs.*, 320 U. S. 368, 88 L. ed. 107, this court said (p. 378):

> "We are of opinion that these findings are decisive of this appeal. The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts."

In *United States* v. *Wabash R. Co.*, 321 U. S. 403, 88 L. ed. 827, this court said (p. 408):

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

Since the definitions of "railroad" and "transportation" appear in the same paragraph of the Act and evidence a similarity of purpose in spelling out the extent of the facilities and services subject to the Act, and since the function of the Commission in making findings with respect to both definitions is practically identical in nature and for the same purpose, it is clear that the above authorities apply with equal force to the finding of the Commission here that track 1619 is within the definition of railroad.

It was not the function of the lower court to determine where the weight of the evidence lay or that the Commission's finding was supported by or was against the weight of the evidence. The function of the court was only to determine whether the Commission's finding was supported by the evidence.

"The courts will not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions" for "these matters are left by Congress to the administrative tribunal appointed by law and informed by experience."

United States v. *New River Co.*, 265 U. S. 533, 542, 68 L. ed. 1165, 1172.

Chicago, I. & L. R. Co. v. *United States*, 270 U. S. 287, 294, 70 L. ed. 590, 594.

Assigned Car Cases (United States v. *Berwind White Coal Min. Co.)*, 274 U. S. 564, 581, 71 L. ed. 1204, 1216.

Virginian R. Co. v. *United States*, 272 U. S. 658, 665, 666, 71 L. ed. 463, 468.

In determining mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power and, in determining that question, the courts will not examine the facts further than to determine whether there was substantial evidence to sustain its order and whether the Commission made the basic or essential findings necessary to support its order.

Interstate Com. Com. v. *Union P. R. Co.*, 222 U. S. 541, 546-548, 56 L. ed. 308, 310-312.

Florida v. *United States*, 282 U. S. 194, 215, 75 L. ed. 291, 304.

Commission's finding supported by evidence.

Appellant submits that the Commission's finding that track 1619 was and is devoted to a public use, and is within the section 1 (3) (a) definition of "railroad", is amply supported by evidence. The use of the track over the years as a connection between railroad-owned segments of spur track No. 245, the transportation of all commodities over the track thus served and, more recently, the transportation of all commodities except live stock, the recognition in their tariffs for years by the railroads of their obligation to deliver freight to said seven industries and receive freight from them, maintenance and operation of the track by the railroad, all agreed to by the Stock Yards, and the other facts detailed by the Commission, at pages 56 to 62 of its report, lead unmistakably to the finding made by the Commission.

Other decisions by courts and the Commission demonstrate correctness of Commission's findings.

A review of the authorities leaves no doubt that the Commission was correct in its finding that track 1619 is and was devoted to a public use and is within the statutory definition of a "railroad".

In the case of *Union Lime Co.* v. *Chicago & N. W. R. Co.*, 233 U. S. 211. 58 L. ed. 924, a controversy arose because a proceeding was instituted by the Chicago & North Western Railway Company to take by eminent domain land for a spur track. The land was owned by the Union Lime Company, and the application of the railway company was resisted upon the ground that the land was sought to be taken for a private and not a public use, and therefore that its taking would operate as a deprivation of the property of the Union Lime Company without due process of law. The right of the railroad to take the land was sustained by the United States Supreme Court. That court quoted with approval (pp. 220, 221) a determination by the Supreme Court of Wisconsin in a similar case as follows:

> " 'Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent, and not the nature, of its use,—the track is none the less a part of the avenue through which the commodities reach the public. * * * Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to

it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it.' "

In the same decision (pp. 221, 222) the court also stated:

"It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority. As was said by this court in *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 608, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008: 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

To the same effect is the recent decision of the United States Supreme Court in *Alton R. Co.* v. *Illinois Commerce Commission*, 305 U. S. 548, 83 L. ed. 344. The relevant facts were stated as follows by the court (p. 550):

"The switch track in question extends from the

carrier's main line about 150 feet on the right-of-way, thence 2,681 feet, crossing public streets and alleys, to the boundary of the plant of the Peoples Gas Light & Coke Company upon land largely, if not wholly, owned by that company and the other industries served by the track. The industries, commencing with the one nearest the main line, are Commonwealth Edison Company, E. Heldmaier, Inc., Moulding-Brownell Corp., and the gas company. All but the first depend upon the track for rail transportation. It has been extended for some distance into the plant of the gas company."

The conclusion of the court is stated as follows (pp. 554-555):

"Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and

across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used, with extensions if any shall be made, to serve the public at large."

Of great interest in this connection is the decision of the Supreme Court of Ohio (the state in which these tracks are located) in *Morgan Run Ry. Co.* v. *Public Utilities Commission*, 98 O. S. 218, 120 N. E. 295. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute giving it powers similar to the provisions of section 1 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service over the disputed track to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said (p. 298):

"It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it, that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in

connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.

As we have shown, the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the supervision of the commission."

In its conclusion the court held (p. 299):

"We therefore hold that, as long as the railway company operates any portion of the railroad in question, it must do so without discrimination in favor of any shipper. This is a small and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so."

A persuasive decision which supports the Commission's conclusion is that of the Circuit Court of Appeals for the Eighth Circuit in *F. C. Ayres Mercantile Co.* v. *Union Pac. R. Co.*, 16 F. (2d) 395. In that case the Ayres Mercantile Company attempted to restrain the Union Pacific Railroad from using certain tracks which the mercantile company owned, for delivery to various industries served over those tracks. The court said (p. 398):

"That these tracks were devoted to a public use, at least after 1890, is fully established by the evidence."

In the present case it cannot be doubted that track 1619 has been devoted to a public use since 1910 or for at least thirty-six years.

Continuing in the *Ayres Mercantile Company* case, the court said (pp. 398, 400):

"'This railroad company had an established line of railroad through the city of Denver, and the tracks upon Blake street authorized by the ordinance were spur tracks from its main track for the benefit of parties who expected to build warehouses on vacant property abutting upon that street. * * * The suggestion that the license was unauthorized because the permitted tracks were not for public, but for private use, cannot prevail. In a sense every spur track to a private warehouse, manufacturing or trading establishment, is for the private use of those who own and conduct the business therein. But in a larger sense, and in the true sense, every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way. It reduces the prices of the articles carried to the consumers, and it increases commerce.'

* * * * *

Certainly the service of a large number of industries by these tracks where shipments were made in interstate commerce, and the use of the same for general switching purposes to the various industries besides the Armour and Arbuckle ones, establish under the authorities a use for public purposes.

* * * * *

Even granting the contention that the original occupation was permissive, the character of occupation might change, as apparently it did here. The gates ceased to exist after 3 years. The railroad company added additional burdens to the trackage in the way of switchback movements, which were a part of its general switching system, and, according to the evidence, these switchback movements to the other industries occurred every day."

Since 1910 track 1619 has been devoted to a public use and so used. The Stock Yards Company voluntarily devoted the track to this use knowing the provisions of the Interstate Commerce Act and the definition of a railroad therein contained.

The decisions just cited are in conformity with and give effect to many rulings of the Commission in earlier cases. Thus, in *St. Louis, Springfield & Peoria R. R.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226 (decided in 1913), the Commission said (p. 237):

> "The terminal properties of carriers, like all other parts of their property, are devoted to the public use and must be treated exactly as all other parts of the property of common carriers are treated in carrying out the spirit and letter of regulatory statutes."

In *Huerfano Coal Co.* v. *C. & S. E. R. R. Co.*, 28 I. C. C. 502, the Commission said (p. 505):

> "That portion of section 1 which makes it the duty of every carrier subject to the provisions of this act to provide transportation, including cars, upon reasonable request therefor must be read into and made a part of that portion of section 1 which deals with the matter of switch connections between common carriers and lateral branch lines of railroad."

In *I. & S. W. Ry. Co.* v. *C., B. & Q. R. R. Co.*, 42 I. C. C. 389, the Commission stated (p. 393):

> "Terminal tracks are a part of the railroad which is subject to the provisions of the act to regulate commerce and to the jurisdiction of the Commission, and in exercising the powers vested in the Commission to establish through routes and joint rates the terminals stand, to all practical intents and purposes, in the same light as any other part of the railroad."

The Stock Yards itself has not in any manner treated track 1619 as a "private sidetrack." It will be recalled

that the New York Central not only operates the track but maintains it. The Commission has frequently held that a railroad common carrier may not bear the expense of maintenance of private industry sidetracks.

One case bearing upon this point is *Sioux City Term. Ry. Switching*, 241 I.C.C. 53. In that decision, after citing prior decisions, the Commission held that it was unlawful for the railroad company to maintain private sidings within the plant boundaries of two packing companies at Sioux City as well as certain private tracks leading to hay barns, etc., which belonged to the Sioux City Stock Yards Company.

The Commission's views upon this question were tersely stated in the recent decision in *John Morrell & Co. Terminal Allowance*, 263 I.C.C. 69, at pages 73 and 74, as follows:

> "In addition to building and furnishing the Morrell Company with the plant tracks described without compensation, respondents have continuously since that time and now maintain them at their own cost and expense. We consider that a violation of section 6 (7) of the Interstate Commerce Act and of the Elkins Act. *Sioux City Term. Switching*, 241 I.C.C. 53. It is a matter justiciable in another forum, but in order to avoid any misconception that by silence with respect thereto we inferentially or otherwise sanction or condone the unlawful rebate, concession, or discrimination, attention is called to it here."

Provision in the leases for maintenance by the New York Central therefore constitutes a strong and convincing admission by the Stock Yards and the railroad of the public nature of the track.

Fact that track 1619 is operated under lease is not controlling.

The District Court found that track 1619 was not within the statutory definition of "railroad" solely or principally because the New York Central operated the track under a lease instead of under a formal dedication or fee ownership. This is apparent from the following statement in the court's opinion (R. 150):

> "The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.
>
> We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively."

The reasoning of the lower court completely ignores the fact that under section 1 (3) (a) it is not important who owns the track. Not only does that section not make ownership an important element, but it distinctly negatives any inference that ownership is material. It states:

> "The term 'railroad' * * * shall include * * * all the road in use * * * whether owned or operated under a contract, agreement, or lease, and also * * * all terminal facilities of every kind used or necessary * * *."

Bearing in mind that the definitions in this section evidence an intention to extend the provisions of the Act as broadly as possible over the property, facilities, and services used by the railroads, and that otherwise the effective-

ness of the Act would be lessened, probably to the point of serious impairment, it is clear that ownership of the track is not important; and that the District Court erred in finding that the fact that the track was operated under a lease, rather than under ownership by the railroad, precluded a finding by the Commission that track 1619 was devoted to a public use and is within the statutory definition of a "railroad."

Consequences of theory relied on by District Court.

As above stated, the decision of the District Court is grounded on the theory that track 1619 could not be devoted to a public use or be part of a railroad within the statutory definition because of "the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively" (R. 150). If this is the law, then it necessarily follows that the Interstate Commerce Act applies only to property and facilities owned in fee simple by or dedicated to the railroad, or that in any event a railroad and its lessor could withdraw from the operation of the Act any leased track or facility merely by placing in the agreement a clause subjecting a certain commodity to discriminatory penalty payments. Obviously, if such were the law, the Act would be ineffective indeed, and a broad avenue of evasion would be opened to railroads and their lessors whereby accomplishment of the purposes of the Act could be frustrated.

From all of the foregoing it is clearly evident that the District Court erred in its finding and in reversing the finding of the Commission that track 1619 is and was devoted

to a public use and is within the statutory definition of a "railroad."

II.

The District Court Erred in Finding and Concluding That No Discrimination Against Swift & Company or Preference of Its Competitors Exists in Violation of Section 3(1) of the Act; and in Finding and Concluding That the Commission's Order Would, Itself, Prefer Swift & Company.

Section 3 (1) is quoted in appendix "A" and in substance provides that it shall be unlawful for a railroad common carrier to make or give any undue or unreasonable preference or advantage to any particular person, firm, etc., or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, or firm, or any particular description of traffic, to any undue or unreasonable disadvantage in any respect whatsoever. This is what is commonly known as the anti-discrimination section of the Interstate Commerce Act.

The Commission found that failure to deliver live stock to Swift & Company results in prejudice against Swift & Company and preference of certain competitors under section 3 (1) of the Act. The findings and conclusion of the Commission are as follows (pp. 67-68 of Commission's decision):

> "Having in mind that, from the time of its first enactment, a principal aim of the act has been to 'cut up by the roots every form of discrimination, favoritism and inequality' (*Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *O'Keefe* v. *United States*, 240 U. S. 294, 297), consideration should perhaps be first given to the situation under section 3 which has resulted from the New York Central's refusal to handle live stock

over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of live stock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of live stock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stock yards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting live stock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their live stock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of live stock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named."

The evidence which supports these findings is stated at R. 212-213. This evidence was undisputed.

Nevertheless, in finding VIII (R. 184-185) the District Court found: "The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant."

It stated in conclusion XI (R. 187): "To require the service sought by Swift & Company * * * would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

In conclusion XII the lower court stated (R. 188):

> "Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and unreasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock."

In its opinion the lower court said (R. 152):

> "To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

This appellant submits that the Commission's finding of a violation of section 3 (1) of the Act is amply supported by the evidence and necessarily follows from the undisputed facts. At the outset, of course, it is evident that, if the Commission was correct in its conclusion that track 1619 forms a part of the New York Central public termi-

nals and is within the statutory definition of "railroad" and that the New York Central is as much subject to the provisions of law with respect to that portion of track 245 "as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places" (Commission's decision, p. 65), then the Commission's finding of a violation of section 3 (1) follows as a matter of course. Since track 1619 is part of the railroad, the fact that the management of the railroad choses to lease the track rather than purchase it or acquire it by condemnation obviously could not be a consideration controlling on the Commission in determining the existence of prejudice or discrimination under section 3 (1).

By reference to appendix "B" it will be noted that the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company are in the stock yards terminal area and located only a few city blocks from the Swift plant. The New York Central refuses to switch live stock shipments to the Swift plant but does switch them at the flat Cleveland rates to the three competing plants just named. If in the operation of its spur track 245, including the 1619 feet of stock yards track, the New York Central is subject to the provisions of the Interstate Commerce Act, as the Commission has found, it follows that the refusal of the New York Central to switch live stock shipments to the Swift plant, while switching them to three competing plants in the same terminal area, is necessarily an unwarranted discrimination and constitutes undue prejudice to the Swift plant and undue preference of the three competing plants.

Whether or not a particular preference or discrimination is undue or unreasonable is a question for determination by the Commission which will not be set aside by the courts if supported by substantial evidence.

Decisions of this court so holding are numerous. Some of them are as follows:

In *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 59 L. ed. 245, this court stated (pp. 320-321):

> "In view of the doctrine announced in *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 23-29, 45 L. ed. 719, 727-729, 21 Sup. Ct. Rep. 516. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view

of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

In *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 62 L. ed. 831, this court said (p. 481):

"Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or, for some other reason, amount to an abuse of power. This results from the provisions of §§ 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. at L. 589-591, chap. 3591; 36 Stat. at L. 551-554, chap. 309, Comp. Stat. 1916, §§ 8583, 8584), expounded in familiar decisions."

Nashville, C. & St. L. R. Co. v. *Tennessee*, 262 U. S. 318, 67 L. ed. 999, was another case involving an order of the Commission dealing with discrimination under section 3 of the Act. The court said (p. 322):

"Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case."

In *Virginian R. Co.* v. *United States*, 272 U. S. 658, 71 L. ed. 463, this court said (pp. 663, 665-666):

"Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was

some irregularity in the proceeding or some error in the application of rules of law.

* * * * * *

The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois C. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700. This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.'"

In *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 84 L. ed. 1243, this court said (pp. 352-353):

"'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed.' And where a court substituted 'its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, (the court) obviously exerted an authority not conferred upon it by the statute.' So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determina-

tion, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.'"

In *Board of Trade* v. *United States*, 314 U. S. 534, 86 L. ed. 432, this court said (pp. 546, 548):

"'Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.' *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 481, 62 L. ed. 831, 844, 38 S. Ct. 383; see *Nashville, C. & St. L. R. Co.* v. *Tennessee*, 262 U. S. 318, 322, 67 L. ed. 999, 1002, 43 S. Ct. 583; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352, 353, 84 L. ed. 1243, 1248, 1249, 60 S. Ct. 931.

* * * * *

We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."

Length of track, distances, and locations furnish no support to District Court's finding.

The fact that, in order to reach the Swift plant the cars must traverse track 1619 and several hundred feet of track beyond, whereas in order to reach the sidings of The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company the cars need not traverse such tracks, furnishes no support for the court's reversal of the Commission's findings with respect to section 3 (1) or for the court's own finding that the Commission's order would, itself, prefer Swift & Company.

In its report at page 70, the Commission states:

> "As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:
>
> > It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there."

As stated by the Commission, the railroads as a general practice make industrial deliveries within the Cleveland switching district at the line-haul rates to Cleveland. It will be noted that this general practice is followed as to all commodities destined for the Swift plant except livestock. If the railroads are willing to transport a carload of freight to any other point in the Cleveland switching district at the line-haul rate, it becomes apparent immediately that singling out livestock to seven industries for penalty payments could not possibly be justified by the few hundred additional feet a car must travel in order to move from the New York Central main line north of the stock yards to Swift & Company and the other six plants. If track 1619 were owned by the New York Central, no one would be likely to contend that higher rates or any discriminatory practices would be justified in connection with transportation of any commodity to the Swift plant.

It is clear that the only distinction upon which the District Court could reasonably have relied in reversing the Commission's findings with respect to section 3 (1) is that track 1619 was leased by the railroad instead of owned by it. As heretofore pointed out, the facts with respect to ownership of the track are unimportant in the application of the Interstate Commerce Act. If such ownership carries any weight whatever, it would be the function of the Commission rather than the court to determine its weight. Such facts, it will be noted from the Commission's report, were all taken into consideration by the Commission.

It is evident that the District Court erred in reversing the findings of the Commission with respect to section 3 (1) of the Act and also in making findings of its own with respect thereto.

III.

The District Court Erred in Concluding That No Legal Basis Exists for a Finding of Any Violation of Section 1 (6) of the Act.

From appendix "A" it will be noted that section 1 (4) of the Act makes it the duty of every common carrier by railroad to provide and furnish transportation upon reasonable request therefor. Section 1 (5) (a) of the Act provides that all charges made for any service rendered in the transportation of property shall be just and reasonable; and unjust and unreasonable charges are prohibited and declared to be unlawful. Section 1 (6) provides that it is the duty of common carriers subject to the Act to establish, observe, and enforce just and reasonable regulations and practices affecting various matters, including facilities for transportation "and all other matters relating to or

connected with the receiving, handling, transporting, storing, and delivery of property", which may be necessary or proper to secure prompt handling, transporting, and delivery of property upon just and reasonable terms; and unjust and unreasonable regulations and practices are prohibited and declared unlawful.

The reading of these sections discloses that they are intended to give broad regulatory powers with respect to rates, regulations, and practices. The use of such terms as "just and reasonable" reveals an intention to empower the Commission with very broad discretion in making findings, conclusions, and orders to accomplish the purposes of these sections.

At pages 68 and 69 of its report, the Commission made findings with respect to section 1 (6) of the Act, reading in part as follows:

> "The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure,

in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act."

The court, however, stated as follows in conclusion XIII (R. 188):

"In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act."

Section 1 (6) imposes the same obligations with respect to practices which are imposed by section 1 (5) (a) in connection with rates. The Commission found that failure to accord delivery directly to Swift's sidetracks was, under the recited facts, an unlawful practice in violation of section 1 (6). That failure to accord such delivery is a practice is manifest. Whether such practice is unjust and unreasonable is one of those questions which the Commission has been empowered by Congress to decide.

Commission's finding binding on lower court.

There is no law defining such terms as "undue," "unjust," or "unreasonable" as used in sections 1 (3) (a), 1 (5) (a), and 1 (6) of the Act. Section 15 (1) provides that, whenever the Commission shall be of the opinion that "any * * * rate" or "any practice whatsoever * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," the Commission "is hereby authorized and empowered * * * to make an order that the carrier or carriers shall cease and desist from such violation * * *."

It is plain that Congress intended the Commission and

not the courts to find whether a given rate or practice is "unjust and unreasonable" or "unduly preferential or prejudicial." There are certain decisions so indicating which dealt directly with section 1 (6). Those cases will be cited by the other appellants. There are also numerous decisions so holding with respect to section 1 (3) (a) and 1 (5) (a) of the Act. Since there is nothing in the Act indicating any intention by Congress that the findings under section 1 (6) are to be considered different in nature or any less subject to the primary jurisdiction of the Commission than findings under the other sections mentioned, this appellant therefore submits that prior decisions, outlining and comparing the powers and functions of the courts and of the Commission with respect to findings under sections 1 (3) (a) and 1 (5) (a), are equally applicable to findings under section 1 (6) and leave no doubt that the District Court erred in substituting its judgment for that of the Commission.

At page 15 *et seq.* of this brief, authorities are cited involving findings under section 1 (3) (a). At page 33 *et seq.* hereof, authorities involving section 3 (1) are cited. Other decisions of similar import, dealing principally with findings under section 1 (5) (a), are as follows:

Akron, C. & Y. R. Co. v. *United States*, 261 U. S. 184, 67 L. ed. 605, was a case involving an order of the Commission which fixed divisions of rates between connecting carriers. This court said (p. 204):

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

United States v. *New River Co.*, 265 U. S. 533, 68 L. ed. 1165. This was a case involving an order of the Commission with reference to distribution of cars to coal mines. This court said (p. 542):

> "The courts will not review determinations of the

Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions."

In *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 71 L. ed. 911, this court said (pp. 33-34):

"Second. If the order of the commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 203, 67 L. ed. 605, 615, 43 Sup. Ct. Rep. 270. But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom, of the commission's action."

In *United States* v. *Berwind-White Coal Min. Co.*, 274 U. S. 564, 71 L. ed. 1204 (a case involving distribution of cars to coal mines), this court said (pp. 580-581):

"There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission (*Western Paper Makers' Chemical Asso.* v. *United States*, 271 U. S. 268, 271, 70 L. ed. 941, 942, 46 Sup. Ct. Rep. 500), or to enquire into the soundness of the reasoning by which its conclusions are reached (*Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 471, 54 L. ed. 280, 288, 30 Sup. Ct. Rep. 155; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 562, 63 L. ed. 772, 776, 39 Sup. Ct. Rep. 375), or to question the wisdom of regulations which it prescribes (*United States* v. *New River Co.*, 265 U. S. 533, 542, 68 L. ed. 1165, 1172, 44 Sup. Ct. Rep. 610). These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.'"

Merchants Warehouse Co. v. *United States*, 283 U. S. 501, 75 L. ed. 1227, was a case involving alleged discrimination by railroad carriers to warehouses. With respect to review of the Commission's decision this court said (p. 508):

"The credibility of witnesses and weight of evidence

are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence."

In this decision the court also stated an additional important conclusion as follows (p. 511):

"Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity."

In *Mississippi Valley Barge L. Co.* v. *United States*, 292 U. S. 282, 78 L. ed. 1260, this court said (pp. 286, 287):

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.

• • • • •

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report."

Rochester Telephone Corp. v. *United States*, 307 U. S. 125, 83 L. ed. 1147, involved review of an order of the Federal Communications Commission. Nevertheless the decision is based largely upon a discussion of prior cases dealing with court review of orders of the Commission under the Interstate Commerce Act. Referring specifically to that act this court said (pp. 139-140, 146):

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable.

• • • • •

> Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; 78 L. ed. 1260, 1264, 1265, 54 S. Ct. 692; *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303 *et seq.*, 81 L. ed. 659, 664, 57 S. Ct. 478."

In *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 88 L. ed. 1420, this court quoted the following statement made in a Federal Power Commission case (pp. 512-513):

> "'Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, *ante*, 333, 64 S. Ct. 281."

The decisions above cited leave no doubt that the only proper function of the District Court was to determine whether the Commission's finding under section 1 (6) was supported by substantial evidence.

Finding amply supported by evidence.

It would be difficult to imagine a more apparent example of a practice which could properly be described as unjust or unreasonable than the inexcusable refusal to make delivery of a commodity to the consignee. In the instant case, therefore, it is fair to state that all of the evidence points to unreasonableness of the practice complained of

except ownership of track 1619. But ownership of the track is material only as one circumstance of many to be considered in ascertaining whether track 1619 is a "private sidetrack" or is within the statutory definition of "railroad." As heretofore pointed out, the Commission properly found that track 1619 is not a private sidetrack and is within the statutory definition. It necessarily follows that an unreasonable practice exists within the meaning of section 1 (6). Not only is the Commission's finding supported by evidence, but no facts are discernible which could be said to cast any doubt on the validity of the Commission's finding.

The lower court erred in substituting its judgment for that of the Commission and in concluding that no legal basis exists for a finding of any violation of section 1 (6) of the Act.

IV.

The District Court Erred in Concluding That No Legal Basis Exists for a Finding of a Violation of Section 1 (9) of the Act.

Section 1 (9) of the Act is quoted in full in appendix "A". The leading cases and particularly *Cleveland, C.C. & St. L. R. Co.* v. *United States*, 275 U. S. 404, 72 L. ed. 338, are summarized by the Commission at page 69 of its decision, and what is there said need not be repeated here.

Under section 1 (9) of the Interstate Commerce Act certain primary findings of fact by the Commission are necessary, and these have been made.

The first essential finding is stated by the Commission as follows (decision, p. 71):

> "We find that the complainant has made application in writing to the carrier for the operation of the switch connection discussed and has tendered interstate traffic to such carrier;"

The demand of Swift upon the several railroad companies, including the New York Central, for operation of the switch connection for the transportation of live stock is contained in a letter of August 14, 1941, which is exhibit 4 in the Commission's record (R. 317). The refusal of this demand by the railroads is exhibit 5 in the Commission's record (R. 318).

The next finding of the Commission is (decision, p. 71):

> "that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant;"

This action by the railroads is shown by exhibit 5 of the Commission's record, above referred to, and is not disputed.

The next finding of the Commission is (decision, pp. 71-72):

> "that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central."

As supporting this finding it is undisputed that the track connection was operated and under the tariffs of the New York Central was available for the delivery of live stock as well as all other traffic since 1910. There is no indication in the record that the track connection is unsafe or impracticable. In fact the statement by counsel for the New York Central at the argument before the Commission on October 3, 1945, quoted in the latter half of page 70 of

the Commission's decision, indicates that the only excuse for not operating the track connection for the delivery of live stock is because of the objection of the Stock Yards Company and not because the track connection is not practicable, may not be operated with safety, or will not furnish a sufficient volume of traffic to justify its operation.

The next finding of the Commission is as follows (decision, p. 72):

> "We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section."

This finding rests upon substantially the same evidentiary facts as does the finding of discrimination under section 3 (1); that is to say, that the railroads do deliver live stock over similar switch connections in the stock yards district to competitors of Swift, namely, Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, while refusing to make similar deliveries to Swift.

It may be noted that the prohibition against discrimination is stated in section 1 (9) in the broadest terms, to wit, that the carrier shall operate the switch connection "without discrimination in favor of or against such shipper." The ultimate finding of the Commission (decision, p. 72) of a violation of section 1 (9) of part I of the Interstate Commerce Act necessarily follows as a matter of course.

Nevertheless the District Court stated in its conclusion XII (R. 187):

> "In view of the undisputed disparity existing between the direct private sidetrack connections of Swift

& Company's three named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act."

In its conclusion XV (R. 188) the District Court also stated:

"* * * There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

Here, as in connection with other sections of the Act previously discussed, the District Court erroneously substituted its judgment for that of the Commission. Where the Commission found similarity of conditions, the District Court found disparity of conditions. Where the Commission found discrimination, the District Court found lack of discrimination.

The argument at page 33 *et seq.* of this brief, pertaining to the validity of the Commission's finding of discrimination under section 3 (1), also supports the Commission's finding under section 1 (9) and will not be repeated here.

The District Court's conclusion XV seems to indicate that the lower court's finding as to section 1 (9) was prob-

ably based upon a misconception of fact. In conclusion XV (R. 188) the court stated:

> "Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and the right-of-way of the railroad * * * and the shipper discards that arrangement * * *."

The record indicates that Swift never had any opportunity of constructing its own private sidetrack to connect directly with the main line of the railroad but that the track from the right-of-way southward was to be railroad constructed and owned. This is evident from the following: Swift's predecessor bought four lots at an expense of $5,000 in order to secure land over which it could give the railroad an easement (Ex. 11; R. 347). Easements for the 16-foot right-of-way were given to the railroad in 1908 (Ex. 30; R. 419). From exhibit 13 it will be noted that the railroad does own the track along the right-of-way granted by such easements (R. 270).

A shipper has no power to maintain condemnation actions. Only railroads have that power, and their power, as a rule, is limited to condemning for public rather than private uses.

It is evident that Swift and the other industries attempted to induce the railroad to build a line to be owned and operated by the railroad, to which line the shippers might connect their own private sidings. The shippers furnished the easements but were unwilling to contribute to the railroad an amount of money which the railroad demanded before it would construct and operate such a track. In connection with these facts, see the quotation from *Union Lime Co.* v. *Chicago & N. W. R. Co.*, *supra*, at page 19 herein.

Thus it is evident that the District Court was mistaken

in assuming that Swift ever had an opportunity of reaching the main line of the railroad with a private sidetrack. As is evident from exhibit 12, the private sidings of Swift & Company connect with a track owned and operated by the New York Central at points immediately east of the Swift plant. This is one of the numerous instances where industries not adjacent to a railroad track endeavor to induce the railroad to build a track to the industry properties to which the industries may connect their private sidings.

In this case the public track was built and exists along the south and east sides of the main Swift plant, and the Swift sidings are there connected to the public track. However, since the railroad and the industries were not able to agree on the amount to be contributed to the railroad by the industries, the earlier proposal was not adopted, but the same result was accomplished by the connection across 65th Street, which was actually built. The shipper here desired the railroad to build a track to which the shipper could connect a private siding. The railroad demanded a larger cash contribution from the shipper than the shipper was willing to pay as an inducement to the railroad to build the public track. It would be a novel principle, indeed, if, by refusing to accept any offer made by the railroad, the shipper would thereby deprive himself forever from the protection of the Interstate Commerce Act. It would be even more startling to say that the fact that the shipper and the railroad were unable to agree on some proposal in 1908 thereby deprives the Interstate Commerce Commission of power to perform its duties under the Act or changes or affects in any way the use to which track 1619 has been devoted over the years. Conclusion XV of the District Court is utterly fallacious.

In view of the unassailable finding of the Commission

that track 1619 has been and is devoted to a public use and is within the statutory definition of a "railroad" and since all of the other requisite findings were made to support such a conclusion, this appellant submits that the Commission properly found that section 1 (9) of the Act was violated by the refusal of the defendants to make direct deliveries of live stock to the Swift plant.

V.

The District Court Erred in Finding and Concluding That the Order of the Commission Would Constitute an Appropriation of Property to the Use of Swift & Company.

In its opinion and conclusions the District Court states that the Commission's order would appropriate the Stock Yards' property to the use of Swift & Company without due process of law. That the District Court erred in so holding is demonstrated by the following.

The Stock Yards at all times permitted the use of track 1619 by the New York Central or its predecessor in performing its common carrier services. From time to time the Stock Yards and the New York Central entered into leases providing for use of the track by the railroad and also providing, after 1924, for maintenance as well as operation of the track by the railroad. It is elementary that parties cannot, in a contract, abrogate statutes. On the contrary, the existing laws become a part of the contract.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82, 52 L. ed. 681, 695, this Court said in a case involving the Interstate Commerce Act:

> "The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it."

Having voluntarily granted use of the track to the railroad for the purpose of the railroad's public duty under the Interstate Commerce Act, and knowing full well that the railroad was a common carrier subject to the jurisdiction of the Interstate Commerce Commission, the Stock Yards cannot seriously contend that its property is taken without due process merely because the Interstate Commerce Commission orders the track to be operated in a nondiscriminatory and lawful manner as required by the Act. As stated by the Commission at page 67 of its decision, "the Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws."

To say that the Commission's order "appropriated" property of the Stock Yards is utterly untrue. Not one word will be found in the Commission's report and order which could be construed as ordering an appropriation. The Commission simply considered the evidence, made findings of fact, as it is obligated by law to do, and ordered the defendants to do what the Act requires them to do. The Stock Yards Company appropriated track 1619 to the use of the New York Central for the purpose of obtaining, at railroad expense, maintenance of all its tracks at the stock yards. Use of the track for live stock was an unavoidable consequence resulting from appellees' own voluntary action, and appellees unjustly accuse the Commission of appropriating the track.

The necessary effect of the lower court's conclusions is that a contract between a lessor and a railroad supersedes the Interstate Commerce Act, ousts the Commission of any jurisdiction over the railroad's operation of the track leased, and leaves the parties free to discriminate and penalize shippers and engage in unjust and unlawful practices in any manner they see fit. The contention is novel that our Constitution protects the right of parties to use their propery in an unlawful manner or that it confers any

right on railroads and their lessors to nullify or repeal the Interstate Commerce Act merely by inserting in a lease a provision which would penalize transportation of a specific commodity over a leased track.

The lower court's belief that the Commission's order would subject track 1619 to "the use of Swift & Company" is untrue on its face. The Swift plant has its private sidetracks which connect with a public track owned by the New York Central on or at the boundaries of the Swift premises. Swift does not use track 1619. The railroad uses it in performing its duties as a common carrier.

It is no concern of Swift whatever who owns the fee title to track 1619 or any other portion of a track anywhere in the United States over which the New York Central or any of its connecting carriers transport commodities in carrying on their occupations as common carriers. Swift & Company merely tenders commodities for transportation by the carriers from one point to another. Swift cannot be said to "use" track 1619 to any greater or different extent than it does any other portion of the national railway system over which a car of its commodities may pass while being transported by a railroad. As previously pointed out, under the Interstate Commerce Act it is entirely immaterial who owns the track if it is being used for a public purpose as is track 1619.

The District Court found that Swift and the other industries being served by track 245 at all times had notice of ownership by the Stock Yards. The District Court did not point out where, in the record, any evidence is found justifying such a finding. At any rate, for the reasons heretofore stated, it would be entirely immaterial whether any of such industries had knowledge of such matters. It is the obligation of the carrier to provide facilities with which to perform its undertaking, and whether it chooses to

purchase, condemn, lease, or acquire those facilities in some other manner is no concern of the shippers.

It also may be observed that, even if track 245 led only to the Swift plant, nevertheless Swift is not the only party who would be entitled to cause products to be transported by a carrier over the track. Any person in the United States caring to ship products to or from the Swift plant would be equally benefited. As stated by the Supreme Court of Wisconsin and quoted in *Union Lime Co.* v. *Chicago & N. W. R. Co.*, 233 U. S. 211, 220, 58 L. ed. 924, 929, "over it (the track) the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof."

It is to be noted that a few days before the railroads and the Stock Yards filed their complaints in the lower court, the Stock Yards sent a letter to the New York Central (R. 54) in which the Stock Yards professed to terminate the lease of track 1619 to the railroad six months later. This appellant is advised that the notice has been withdrawn. Whatever the effect may be of an attempted termination of this kind, this case presents no issues pertaining to such possibility. The order of the Commission necessarily was based upon the facts presented to the Commission, and this appellant submits that the Stock Yards under no imaginable circumstances could, by serving notices of this kind at the time it did, thus retroactively render void or illegal the order of the Commission. At any rate, the District Court refused even to admit such notice as evidence, and obviously its action was correct. Finally, if any doubt remained, the situation now is the same as when the Commission rendered its order inasmuch as the notice has been withdrawn. The question of the effect and legality of any such notice is not a matter to be considered by this court in this proceeding.

VI.

The Cleveland Union Stock Yards Company Was a Proper Defendant in the Proceeding Before the Commission and Is Bound by the Commission's Order in That Case to the Same Extent as the Railroad Defendants Therein.

The plaintiff in No. 24479, Cleveland Union Stock Yards Company, alleged among other things (paragraph IX of the complaint; R. 88 *et seq.*) that the Commission erred as a matter of law in asserting jurisdiction over said plaintiff and over the subject matter of the complaint. This was apparently upon the theory that the Stock Yards Company is not a common carrier by railroad subject to the Interstate Commerce Act. The following argument is included here in anticipation that the Stock Yards Company will make the same contention before this court.

Swift made the Cleveland Union Stock Yards Company a defendant to its complaint before the Commission, and the order entered by the Commission runs against the Cleveland Union Stock Yards Company as well as the railroad defendants. It is the contention of Swift that the Stock Yards Company was a proper party defendant; that it is bound by the order of the Commission to the same extent and subject to the same penalties as are the railroad defendants; and that any action by the Stock Yards Company for the purpose of evading the order of the Commission would violate 18 U. S. C. A. § 550, in that the Stock Yards Company would thereby be aiding, abetting, counseling, commanding, inducing, or procuring the commission of an Act constituting an offense defined in a law of the United States.

Statutory provision under which Stock Yards Company was made a defendant.

Section 2 of the Elkins Act, 49 U. S. C. A. § 42, reads as follows:

> "In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Since the Stock Yards Company was the owner of track 1619 and since it was by request or compulsion of the Stock Yards Company that the New York Central discontinued delivery of live stock to the Swift plant, it was believed at the time the complaint was filed with the Commission that it was proper under this provision of the Elkins Act to make the Stock Yards Company (in addition to the Cleveland railroads) a party defendant, because the Stock Yards Company was interested in or affected by the regulation or practice under consideration. It will be noted that said section of the Elkins Act provides that orders of the Commission may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are authorized by law with respect to carriers. It is our position that said section of the Elkins Act means literally what it says and that this conclusion is supported by such decisions of the courts as have arisen

under it. We summarize below the principal decisions of that character.

In *United States* v. *Milwaukee Refrigerator T. Co.*, 145 F. 1007, the Circuit Court of Appeals upheld a decree against a refrigerator transit company, which was neither a carrier nor a shipper, as coming within the provisions of this section. The Commission could doubtless have entered an order equivalent to the court decree.

In *United States* v. *Phillips Petroleum Co.*, 36 F. Supp. 480, 484, the District Court said:

> "Section 2 of the Elkins Act deals with the procedure for enforcing the provisions of the statutes relating to interstate commerce and provides for bringing into court additional parties other than carriers, persons interested in or affected by rates or regulations. In this portion of the statute Congress had in mind the enforcement of the Interstate Commerce Act, 49 U. S. C. A. § 1, *et seq.*, as distinguished from punishment for its violation."

Glens Falls Portland C. Co. v. *Delaware & Hudson Co.*, 66 F. (2d) 490, involved a similar question. This was a suit to recover upon a reparation order of the Commission. The Delaware & Hudson Company, a defendant in that proceeding, contended that the order was invalid as to it because it ceased to be a common carrier on April 1, 1930, on which date it conveyed its railroad properties to the Delaware & Hudson Railroad Company. Since it was no longer a carrier, it contended the Commission was without jurisdiction to enter against it the reparation order of August 14, 1930. These contentions were decided adversely to it in the District Court. Upon appeal, the Circuit Court of Appeals said (pp. 491-492):

> "We think they were rightly decided. The findings of fact which established the liability of the Delaware & Hudson Company had been made on June 3, 1929,

before it ceased to be a carrier. The reparation order merely fixed the amount of the damages awarded. Even without specific statutory authority we should agree, for the reasons given below (55 F. (2d) 971, 980-981), that the Commission had jurisdiction to make it; but the matter seems to be put beyond controversy by section 42 of the Act (49 U. S. C. A. § 42), which permits persons in interest other than carriers to be made parties and subjects them to orders of the Commission."

Spencer Kellogg & Sons v. *United States*, 20 F. (2d) 459 (certiorari denied 275 U. S. 566, 72 L. ed. 429), illustrates the same principle. Spencer Kellogg & Sons was neither a common carrier by railroad nor a shipper. It operated certain grain elevators at Buffalo, N. Y., which were used in connection with the transfer of grain between railroads and ships navigating on the Great Lakes. For this service of elevation the railroads, by proper tariff provision, paid the grain elevators 1 cent per bushel. The allegation was that Spencer Kellogg & Sons had violated the law by giving to shippers or consignees of grain moved through its elevators one-half of the 1-cent allowance paid by the railroads—this for the purpose of obtaining more business.

Since the payment by the railroads to Spencer Kellogg & Sons was legal and since Spencer Kellogg & Sons was neither a shipper of the grain nor a common carrier by railroad, practically the sole defense was, as stated by the court (p. 460), "whether a corporation, other than a carrier who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates." This question was discussed at length by the court and, at page 461, it stated:

"Whether the person committing the act is a shipper or carrier is not determinative."

The court stated in substance that the law was enacted to reach any individual or corporate entity who contributed to a concession or rebate and that the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility.

The doctrine of the case, however, is not limited to the payment of a rebate. All of the reasoning would apply equally to any party other than a common carrier by railroad who, by his act, brings about an unjust discrimination, an undue preference, or a denial of transportation service in accordance with the Act.

To the same effect is the litigation commencing (in the United States Supreme Court) in *General Amer. T. Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 84 L. ed. 361. The tank car corporation (not a common carrier by railroad) leased tank cars on a rental basis to the terminal company. For reasons stated in the decision, the tank car corporation refused to continue to pay to the terminal company the excess of the mileage earnings over the rentals paid by the terminal company upon the theory that such additional payments would constitute a rebate, discrimination, or concession which had been condemned in certain decisions of the Commission. The Supreme Court held that the litigation involved a question requiring primary administrative action by the Commission. The court said (p. 433) that when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved "the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices." The court further held that the case should not be dismissed below but should be held pending the conclusion of an appropriate administrative proceeding, and remanded the case for action by the District Court in conformity with the opinion.

Following this decision of the Supreme Court, the action taken by the Commission in conformity therewith appears in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371. The Commission held in substance that a payment to the oil works by the tank car corporation in excess of the rental paid by the oil works to the tank car corporation would be unlawful. After this administrative decision by the Commission the case came again before the Supreme Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 90 L. ed. 1053. The Supreme Court sustained the Commission's decision on the merits. The tank car corporation was neither a shipper nor a common carrier by railroad. Nevertheless the Commission held that a payment to the oil works by the tank car corporation in excess of the rental paid by the oil works for the tank cars would violate certain specific provisions of the Interstate Commerce Act.

If a person other than a common carrier by railroad may be restrained by a finding or order of the Commission or a decree of a court from acting as a conduit for rebates or bringing about undue preference or prejudice, as in the tank car case, no reason exists why the Stock Yards Company, as well as the railroad, could not be required by the Commission in the present proceeding to cease and desist from acts which result in violations of certain portions of section 1 and other sections of the Interstate Commerce Act.

CONCLUSION.

This court should find that the District Court erred in enjoining the order of the Commission, and should reverse the judgment of the District Court with directions to dismiss the complaints.

Respectfully submitted,

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Chicago, Illinois,

....., 1948.

APPENDIX "A".

Interstate Commerce Act, as Amended, Part I (49 U. S. C. A.).

"SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * * * *

(3) (a) The term 'common carrier' as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this part it shall be held to mean 'common carrier'. The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery,

elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'person' as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * *

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

* * * * * *

(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to

install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

* * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by

railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to

the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial,

team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to deter-

mine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense."

* * * * *

Elkins Act, Section 2. (49 U. S. C. A. § 42.)

"In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

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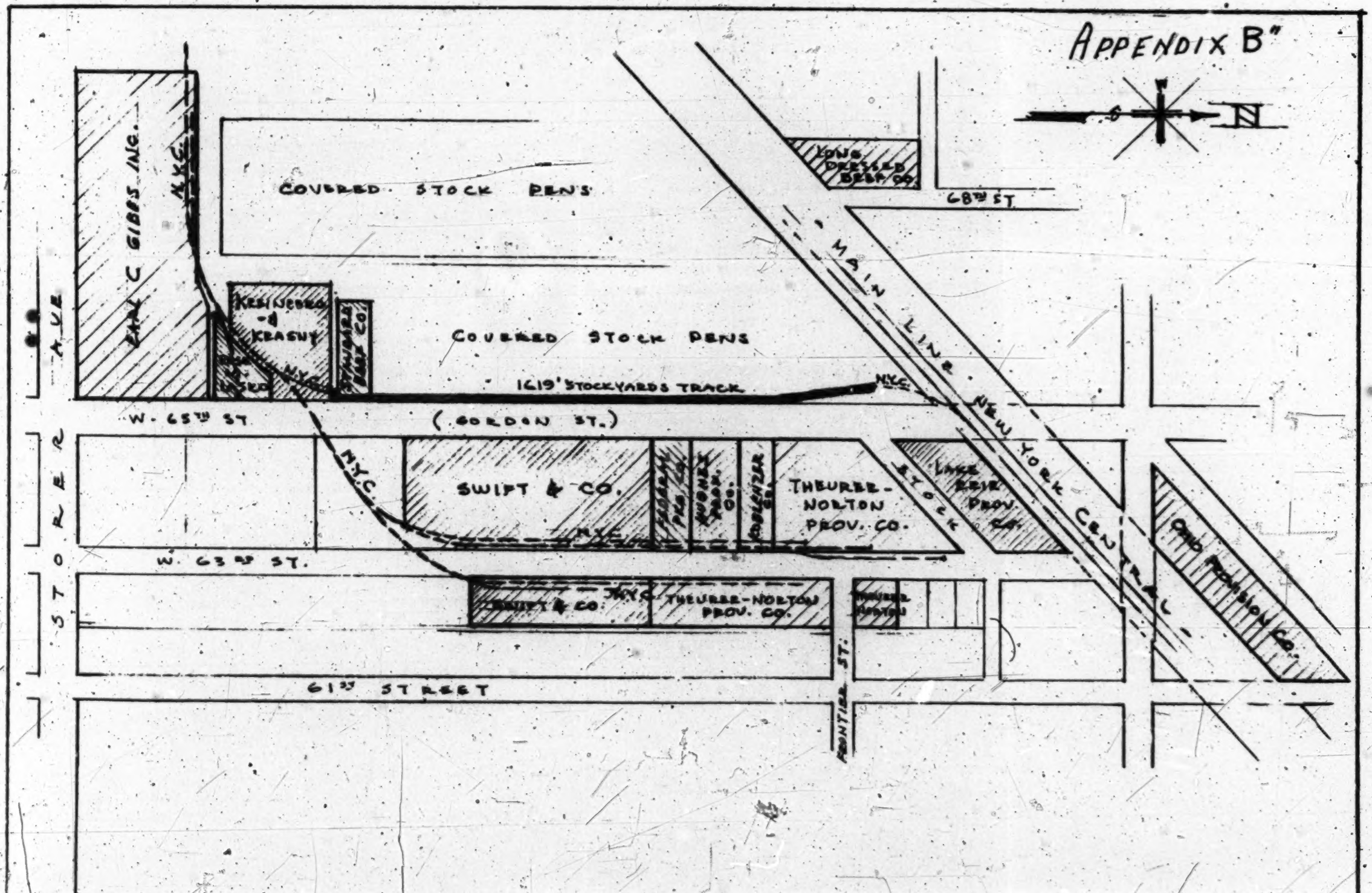
APPENDIX B"



APPENDIX "C"

24760

INTERSTATE COMMERCE COMMISSION

No. 28714

SWIFT & COMPANY v. BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted October 8, 1945. Decided May 3, 1946

1. The refusal of defendants to deliver to the sidetrack of complainant, at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, found to be unduly prejudicial and preferential in violation of section 3 (1), an unreasonable and unlawful practice in violation of section 1 (6), and in violation of section 1 (9) of part I of the Interstate Commerce Act. Order issued directing the correction of these violations.
2. Where complainant makes application in writing to a railroad for the operation of a switch connection, has tendered interstate traffic to such carrier and the carrier has refused to maintain or operate such connection for the transportation of livestock to complainant's plant, and the record shows operation over the track for a number of years for the transportation of livestock, and at present for the transportation of commodities other than livestock, and the connection is practicable and may be made with safety, as in this case, and will furnish reasonable compensation to the carrier with whose line the connection is made, and the carrier refuses to maintain and operate such connection, a discrimination against complainant and a violation of section 1 (9) is found to exist.
3. Carriers cannot make contracts which abrogate the provisions of the Interstate Commerce Act.
4. The record does not contain evidence authorizing an award of reparation.

Ross D. Rynder for complainant.

W. N. King, R. R. Pierce, Kemper A. Dobbins, D. P. Connell, John J. Fitzpatrick, Andrew P. Martin, Willis T. Pierson, Dwight B. Buss, G. H. P. Lacey, A. Z. Baker, M. S. Farmer, and *C. R. Heinemann* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the report proposed by the examiners, and the issues were argued orally. Our conclusions differ from those recommended by the examiners.

By complaint filed September 5, 1941, complainant corporation alleges that the refusal and failure of defendants to deliver interstate carload shipments of livestock to complainant's sidetrack facilities at its packing plant in Cleveland, Ohio, have subjected and will subject complainant to charges for the transportation of livestock which were,

the situation under section 3 which has resulted from the New York Central's refusal to handle livestock over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of livestock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of livestock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stockyards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named.

The history of the New York Central's spur No. 245 has been outlined above. The complainant negotiated for its construction, conveyed to the railroad part of the land necessary for right-of-way, and obtained the necessary city ordinance for crossing Sixty-fifth Street. At about the same time, complainant's own plant track connecting with the spur was constructed under agreement with the railroad, and from time to time thereafter extensions of the track have been constructed under like agreements. The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such

service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Furthermore, section 1 (9) of the act, earlier outlined, which empowers us to require the railroads to construct, maintain, and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers.

The language of section 1 (9) has been interpreted by the Supreme Court in *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 216 U. S. 531, 537, as having for its object "primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. * * *" And in *United States* v. *B. & O. S. R. Co.*, 226 U. S. 14, 19, the Supreme Court stated that "the most obvious examples of such lines [lateral, branch lines] are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment."

In the case of *Cleveland C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, the Supreme Court held (page 408) that the authority conferred upon us by section 1 (9) of the act is not affected by the exemption of industrial, team, et cetera, tracks contained in section 1 (22); that paragraphs (18) to (21), inclusive, of section 1 do not cover sidetracks built by shippers, but section 1 (9) relates "to switch connections with private sidings built by the shipper" (page 408); that the authority to require one carrier to construct and operate a switch connection between its main line and the private sidetrack of an industry, conferred upon this Commission by section 1 (9), is not confined to a case where the industry has no direct connection with the main line of any other carrier (pages 412–418), and that the word "shipper" as used in the paragraph is not confined to one who, at the time he makes application for the switch connection referred to in the

are, and will be unreasonable, unjustly discriminatory, unduly preferential of complainant's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) (a), (5), (18), (19), (20), and of sections 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act are alleged. In its briefs complainant urges that the evidence also establishes violations of section 1 (4), (6), and (9) of the act. The complaint is broad enough for us to consider the case under those provisions of the act as well as others. To plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29.

Complainant seeks the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. Complainant also seeks reparation in such sum as it may have been or may be required to pay, in excess of the line-haul rates, in order to obtain delivery of livestock, since August 10, 1941, and *pendente lite*. Reference herein to The New York Central Railroad Company will include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, lessee); and reference to complainant will include its predecessors, Henry C. Thom, People's Packing Company, and People's Packing & Provision Company.

The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards, is made a defendant, and is alleged to be partially responsible for the alleged violations of the act. The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations or practices under consideration within the meaning of section 2 of the Elkins Act, 49 U. S. C. A., sec. 42, shown in the footnote.[1]

Complainant's packing plant at Cleveland extends from West Sixty-third Street on the east to West Sixty-fifty Street on the west and is directly across Sixty-fifth Street from the stockyards. The main

[1] "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is spur track No. 245 of the New York Central. The initial 132 feet of this spur is owned and operated by the railroad. The spur then continues 1,619 feet south over tracks and land owned by the Stockyards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned section of the spur, about 793 feet along. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries, including a packing plant operated by Koblenzer Brothers. Track 245 affords the only rail connection between these four industries and three others located west of Sixty-fifth Street, all south of the main line, and the railroads serving Cleveland. Complainant's private sidetrack is operated under an agreement with the New York Central.

The facts with respect to the construction of track 1619 are as follows: On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for its construction. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroad reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The agreement of May 10, 1899, was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business. The New York Central keeps track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it. Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroad by the Stock Yards, complainant, and others.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean

livestock, " a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards' tariff No. 5 applicable to livestock consigned through the stockyards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

Events leading to the construction of the tracks to complainants' plant were as follows:

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909, the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. Had this track been built it would not have been necessary to use track 1619 to reach complainant's plant.

In March 1910, complainant negotiated for the construction of the existing connection with its plant, which, as previously shown, crosses Sixty-fifth Street. It obtained the necessary city ordinance on September 6, 1910. The right-of-way east of Sixty-fifth Street, excepting a small parcel obtained from the stockyards, was conveyed to the railroad by complainant. The New York Central thus used (1) its own spur track, (2) stockyards' track 1619, and (3) its own tracks, to reach complainant's siding. Portions of the railroad's own tracks were laid over its own right-of-way across West Sixty-fifth Street, and on land covered by easements from the stockyards, complainant, Theurer-Norton Provision Company, and others.

Under a sidetrack agreement dated October 27, 1910, between complainant and the New York Central, the railroad was to construct and maintain the plant track at its own expense, to own the track, and to use it for business other than that of complainant when such use would not interfere with complainant's business. Both parties retained the right to discontinue use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed as to an extension of complainant's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of complainant's siding at complainant's expense for construction and maintenance, to be owned by complainant. This agreement also contained 60-day termination clauses in favor of both parties. On April 2, 1938, an agreement covering a sidetrack of the Federal Packing Company immediately north of complainant's siding was assigned to complainant. That agreement also contained a 30-day mutual termination clause.

In the western side of its plant complainant has 10 covered holding pens, sufficient to hold from 5 to 8 double-deck carloads of livestock. Two of the pens are for animals suspected of disease or imperfections. The other 8 pens are used for stock intended for slaughter, which is driven directly across the street from the stockyards, and for stock unloaded from trucks just south of the plant or from cars on complainant's siding near the southeast corner of the plant. On this siding only 1 car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. By constructing movable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time. Truck shipments are received at a different entrance but reach the same alleys and pens. Complainant has land available south of its plant for enlarging its unloading and storage facilities.

From 1910 to February 1, 1935, defendants transported all classes of freight, including livestock, to and from complainant's siding over track 1619, and since February 1, 1935, they have transported all freight, other than livestock, to and from such siding over said track. Defendants also transport carload shipments of livestock to the private sidetracks of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company whose tracks are adjacent to the stockyards but are served by defendants without using tracks belonging to the stockyards. This service is performed by the carriers at the line-haul rates to Cleveland, and the three competitive plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located.

Prior to November 12, 1938, the tariffs of the defendant rail car-

riers provided for delivery of carload shipments of livestock to complainant's siding in Cleveland at the line-haul rates to that point regardless of whether the shipments moved in line-haul service over the New York Central direct to Cleveland or over the lines of other carriers to points of interchange there with the New York Central and thence in switching service by the latter carrier to complainant's siding. The interline or interchange movements were made under authority of a reciprocal switching tariff of the New York Central, which provided for a switching charge of $3.15 (later $3.47) per car for switching carload freight generally, including livestock, from points of interchange with other carriers in the Cleveland switching district to the siding of complainant as well as numerous other industrial sidings in Cleveland. The tariffs of the other carriers provided for absorption of the New York Central's switching charge when their revenues exceeded specified amounts. On November 12, 1938, the New York Central canceled its switching charge on livestock but continued it on all other freight. Since then there has been no specific tariff authority for movement of livestock to complainant's siding when shipped to Cleveland over lines other than the New York Central. No similar cancelation was made, however, as to rates on shipments of livestock billed to complainant's siding for movement in line-haul service over the New York Central to Cleveland. On such traffic the tariffs of that carrier provided, and still provide, for delivery to complainant's siding at the line-haul rates to Cleveland. Nevertheless, for some time prior to November 12, 1938, and continuously since then, defendants have refused to deliver any livestock to complainant's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered all livestock consigned by complainant to itself at Cleveland into the yards of the Stock Yards Company at that point, and have collected the Cleveland line-haul rates on all such shipments. On livestock so delivered 24 hours' free storage is allowed. The stock is driven from the unloading pens through the stockyards to an exit directly across the street from complainant's plant, thence across track 1619 and Sixty-fifth Street into the portion of complainant's plant where it is to be slaughtered. Movable gates, previously installed, confine the stock while crossing track 1619 and Sixty-fifth Street. Certain yardage charges are assessed against the stock for egress from the stockyards.

Prior to 1930, the Stock Yards made no charge for the use of its facilities on direct shipments,[2] and as delivery at the stockyards was then as satisfactory to complainant as delivery on its own siding it billed little, if any, livestock to that siding, although tariffs in effect

[2] Direct shipments of livestock are defined to mean livestock consigned directly to packers for slaughter, and not offered for sale in the public market.

when the siding was constructed and thereafter had authorized such delivery. About 1930, the Stock Yards attempted to charge packers for delivery on direct shipments through the yards, and between January 1, 1930, and February 1, 1935, complainant had 1,161 carloads delivered at its siding on which it paid the line-haul rates to Cleveland. Apparently such deliveries ceased after the latter date. During the same period, complainant also received 2,260 carloads through the stockyards. During a short period in 1934, the Stock Yards collected from the packers certain yardage charges; but, when the packers objected and threatened to divert shipments from the stockyards, the effort to collect such charges from them was abandoned. A charge of $4 per deck for delivery at the stockyards was paid and borne by the road-haul carriers to and including June 9, 1942. This included delivery to complainant.

Between 1916 and 1936, complainant owned stock in the stockyards. Its plant managers at Cleveland from November 2, 1916, to April 28, 1936, served as directors of the stockyards. From 1920 to 1924 the traffic manager of complainant, the stockyards, and the Cleveland Provision Company formed a traffic and transportation committee for the stockyards district. By order of the Supreme Court of the District of Columbia, dated January 31, 1931, complainant was required to divest itself of ownership in public stockyards which was accomplished at Cleveland February 8, 1936.

The duties of the railroads with respect to in-bound shipments of livestock to consignees at the Cleveland Stock Yards include the furnishing of suitable pens for unloading and the service of unloading from the cars into such pens. When those services are performed the carriers' duties are completed. The Secretary of Agriculture has asserted jurisdiction of charges on direct shipments to packers for services accorded by the Stock Yards beyond the unloading pens. For a complete discussion of this question, see *Baltimore & O. R. Co.* v. *Cleveland Union Stock Yards Co.*, 255 I. C. C. 579, decided May 11, 1943. Since then complainant has been required to pay service charges to the Stock Yards in order to obtain possession of its direct shipments through the yards. As stated, the instant complaint seeking delivery at its siding was filed by complainant on September 5, 1941.

The New York Central excuses its failure to make the delivery to complainant's siding in Cleveland as called for in its lawfully filed and published tariffs, which delivery was requested by complainant from and after August 14, 1941, on the ground that to do so it would have to use track 1619 and pay to the Stock Yards Company charges of from $6 to $9 per car demanded by that concern for the use of that track. The New York Central considers these charges exorbitant. It therefore refuses to pay them or to deliver livestock to com-

plainant at its siding. It is our opinion that a carrier may not evade the provisions of its lawfully filed and published tariffs on such grounds. In our report in *Guyton & Harrington Mule Co. v. Louisville & N. R. Co.*, 50 I. C. C. 546, 550, in respect of a somewhat similar situation at Nashville, Tenn., we found that the delivery of livestock, moving as defined in the Interstate Commerce Act, to complainant's siding in Nashville, at the line-haul rates to Nashville, was a privilege and facility shown in the lawfully filed and published tariffs of the delivering carrier, that the denial of the use of those facilities to complainant there was a rule, regulation, or practice in contravention of the carriers' tariff provisions which changed or affected the value of the service rendered to complainant as shipper and consignee, and that it was and will be unlawful for the delivering line to refuse to make deliveries of livestock to complainant's siding in Nashville.

The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. It is our opinion that it cannot, and that the relief sought by Swift should be granted.

Section 1 (1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *." Section 1 (3) (a) provides that the term railroad shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." It defines the term "transportation" as including "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported."

Section 1 (4) provides that—"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor." Section 1 (6) declares:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable

regulations and practices affecting * * * the manner and method of * * * delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * regulation and practice is prohibited and declared to be unlawful.

Section 3 (1) provides that—

It shall be unlawful for any common carrier subject to this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

Section 1 (9) provides—

Any common carrier subject to the provisions of this Act, upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

And it authorizes us upon complaint and hearing to enforce performance of that duty.

Section 15 (1) provides for the enforcement of these several provisions of the law.

These provisions of the law are complementary and clearly confer upon us the power and duty of regulating and controlling the practices of carriers affecting the transportation and delivery of property, and with respect to all the road, instrumentalities, and facilities used by them in performing such services.

Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes delivery and takes receipt of freight in performing its common-carrier switching service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur does not alter the fact that the use it is making

of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant. As stated by the Supreme Court in *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 221–222:

> A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. * * *

Track 1619 and the said railroad spur No. 245 which includes such track are located in the State of Ohio. In *Morgan Run Ry. Co.* v. *Public Utilities Commission*, 120 N. E. 295, the Supreme Court of Ohio had before it a situation closely analogous to that before us here. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute somewhat similar to the provisions of sections 1 and 3 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said:

> It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 528, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.
>
> As we have shown the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the jurisdiction of the commission.

The court therefore held that:

> As long as the railway company operates any portion of the railway in question, it must do so without discrimination in favor of any shipper. This is a small

and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve any company may do so.

Here, as above pointed out, the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245. To say that the Stock Yards, while granting the use of its track 1619 generally for common-carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates. By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary is contracting for its continued use as part of the railroad's common-carrier spur No. 245. Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places.

Before considering the provisions of the act involved in their application to the facts of record, it will be helpful to give further and more particular consideration to the terms of the Stock Yard's contract with the New York Central and their operation in effecting the exclusion of livestock from the traffic switched by the latter over its spur. Such contract does not expressly forbid the use of track 1619 for the carriage of livestock but rather singles it out as a special class of traffic for burdensome treatment. In terms, the contract simply prohibits the "free use" of the track for livestock and provides that a charge for the use thereof for livestock "shall be the subject of a separate agreement." But, after the making of the contract, the Stock Yards, in specifying the terms upon which it would agree to the use of the track for livestock, insisted that the railroad must pay, or assume, the yardage charges on livestock named in Stock Yards' tariff No. 5. The railroad refused to undertake such payments and, in lieu thereof, discontinued the switching of livestock over its spur to the siding of complainant, from which it resulted as stated above, that the latter had to accept delivery of the livestock on the premises of the Stock Yards subject to the payment of the yardage charges.

From the above, it is apparent that, while under the contract and terms of compensation subsequently demanded by the Stock Yards,

it was still open to the railroad to switch livestock over the spur embodying track 1619, the effect of the contract and such terms of compensation was to impose a penalty if it continued to do so. In fact, regardless of the amount of compensation specified by the Stock Yards for the use of its track for the carriage of livestock, the very singling out of livestock for the requirement of special compensation from the railroad shows that the provision is properly classed as a penalty provision, that is, one designed to secure yardage charges on livestock billed and moving to complainant's siding, either from complainant, or from the railroad engaged in hauling the traffic. The ground upon which the railroad discontinued the switching of livestock over the spur was that the compensation (consisting of the yardage charges) demanded by the Stock Yards for the incidental use of its track was exorbitant, but even if the compensation demanded had been but a fraction of that named, the railroad could, so far as the contract was concerned, have followed the same course and thus have avoided the payment of any compensation, or charge, specially set up against the use of the track for the carriage of livestock.

There has been some suggestion that, if we were to order the New York Central to resume the switching of livestock over its spur No. 245, the result of such action would be to compel it to assume payment of the yardage charges named in Stock Yards Tariff No. 5, but we do not think that that is the case. In the first place, there is nothing in the present or previous contracts granting the use of track 1619 to the railroad which even suggests that the parties considered that, in addition to the railroad's assumption of the expense of track maintenance and other consideration for years regarded as entirely adequate, further compensation simply for such use was warranted. Apparently, it was the view of the railroad as well as the Stock Yards that the latter was within its rights as owner of the track to condition its contract for the use thereof in such way as to secure yardage charges on livestock even though billed directly to complainant's sidetrack and plant. But such yardage charges bear no relation whatever to the proper compensation payable simply for the use of the track by the railroad. They were demanded of the railroad, not for its use of the track in carrying traffic generally, but as charges specially assessed against the carriage of livestock. As said above, the provision singling out livestock for the requirement of special compensation was in fact a penalty provision, that is, a provision designed to secure yardage charges on livestock billed and moving to complainant's siding, either by stopping the movement and obtaining payment from complainant, or, if the railroad carried the traffic through as provided in its tariffs and as bills, then as a penalty exacted from the railroad for observing its published tariffs and other

common-carrier duties under the Interstate Commerce Act and the Elkins Act.

It seems evident and, in any event, will be shown that the railroad could not lawfully single out and exclude livestock from the traffic transported over its common-carrier spur. It was, therefore, its duty to retain in its tariffs, as it did, the provision covering and including livestock. The fact that it ignored, and is ignoring, the tariff provision does not absolve it from the duty. The Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws. Whatever may be its right to retain the yardage charges collected from complainant in the past, if, pursuant to order entered by us, the railroad resumes the switching of livestock over its spur, it is our opinion that the Stock Yards could not lawfully collect, or the railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the railroad as a penalty for observing its tariffs and other duties under the laws to which it is subject.

The Stock Yards is, of course, entitled to reasonable compensation for the use of its track but this, we believe, does not mean compensation figured on the basis of what would be its stockyards earnings if the railroad's spur No. 245 was not open for the carriage and delivery of livestock to points beyond its yards. Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use, exact compensation on any such basis. In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract the New York Central is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges assessed as a penalty if it performs such duty.

For reasons above stated, we concluded that the contract between the New York Central and the Stock Yards, had not changed the common-carrier status of the railroad's spur No. 245 but that the latter remained with respect to its said spur as much subject to the act and its provisions as it was with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places. Having in mind that, from the time of its first enactment, a principal aim of the act has been to "cut up by the roots every form of discrimination, favoritism and inequality" (*Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *O'Keefe* v. *United States*, 240 U. S. 294, 297), consideration should perhaps be first given to

paragraph, is a shipper over the line with which the switch connection is desired.

The word "shipper" as used in section 1 (9) is to be given a liberal construction, and includes one receiving traffic from the railroads as well as one offering such traffic for transportation. In either event, Swift comes within the definition as the record shows that the railroads deliver all other classes of freight to the Swift plant over the sidetrack in question, including coal, salt, lumber, et cetera, and move out-bound from the plant over the same track all out-bound shipments which are principally fresh meats and packing-house products. Hence, Swift is a shipper tendering interstate traffic for transportation. The next requirement is that where such a shipper makes such tender, a common carrier by railroad "shall construct, maintain and *operate* upon reasonable terms a switch connection with any * * * private sidetrack which may be constructed to connect with its railroad." The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.

As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:

> It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there.

Complainant points out that the New York Central is compelled to absorb unloading charges of $1.25 per single-deck car and $2.50 per double-deck car on all livestock delivered at the unloading pens of the stockyards, and that these charges would be avoided by making deliveries on complainant's siding.

In *Baltimore Butchers Live Stock Co.* v. *P., B. & W. R. Co.*, 20 I. C. C. 124, decided February 13, 1911, we had before us for consideration a situation in respect of deliveries of livestock at Baltimore, Md., practically identical with that before us here. In that proceeding, complainant sought an order to compel the carriers to deliver livestock to its private siding, and to discontinue delivering same in the Union Stock Yards. The latter delivery had been made under a contract between the carrier and the Union Stock Yards designating the Stock Yards as the exclusive point for all livestock delivered in Baltimore. We found that the refusal of defendants to deliver to the sidetrack of complainant livestock consigned thereto was unreasonable and in violation of the law. At page 128 of our report therein, we said:

> Defendants receive the fertilizer and other products of the abbatoir on this track and deliver thereon the coal, hay, grain, and other articles needed by complainant. Moreover, they receive and deliver on this track for at least one other shipper. By long usage and in accordance with the custom of carriers generally, this track is regarded as the point of delivery and receipt of carload freight and we have heard no argument against the use of this track for livestock deliveries, except that this would be a violation of the contract which the carriers have made with the Union Stock Yards. * * * The railroads defendant may not make contracts which abrogate the act to regulate commerce; they may not refuse, because of their own contract, to furnish delivery that is reasonable upon tracks which they use as a terminal for these shippers; they may not discriminate as between commodities in the delivery which they give, where no reason exists for such discrimination excepting the presence of a contract made with a private corporation, as in this case. The amended act to regulate commerce provides that it is the "duty of all common carriers to establish, observe, and enforce just and reasonable regulations and practices affecting all matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property."

Similar observations are warranted upon the facts of record here. While the spur track in question there was owned entirely by the railroad, we do not consider this as having any legal significance in view of the operation and free maintenance of track 1619 here by the New York Central.

We find that the complainant has made application in writing to the carrier for the operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have

transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

An appropriate order will be entered.

BARNARD, *Chairman*, dissenting:

The majority finds the refusal of defendants to deliver to the sidetrack of complainant at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, to be an unreasonable and unlawful practice in violation of section 1 (6), to be in violation of section 1 (9), and to be unduly prejudicial and preferential in violation of section 3 (1) of part I of the Interstate Commerce Act.

In my opinion the majority's construction of the word "practices" in section 1 (6) of the act is in conflict with the construction placed thereon by the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 228. The Supreme Court, among other things, held that no power was given to this Commission to order a carrier to provide and furnish tank cars that it did not possess even though section 1 of the act defined the term "transportation" as including "cars * * * irrespective of ownership or of any contract" for the use thereof, and made it the duty of every common carrier "to furnish and provide such transportation upon reasonable request therefor." Following the reasoning of the Supreme Court, it is my view that the failure of the railroad to acquire the use of track 1619 to transport livestock to complainant's plant is not a practice within the meaning of section 1 (6).

Section 1 (9) provides:

> Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where

such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

This proceeding does not concern the construction, maintenance, or operation by the New York Central of a switch connection between its track and the private sidetrack adjoining complainant's plant. Such a connection has been maintained and operated by the New York Central for many years under an agreement with complainant. The only question before the Commission in this proceeding relates to the use of 1,619 feet of track constructed in 1899 by the Cleveland Union Stock Yards Company, hereinafter referred to as the Stock Yards, on land owned by it.

Complainant's packing plant extends from West Sixty-third Street on the east to West Sixty-fifth Street on the west and is directly across Sixty-fifth Street from the stockyards. The main line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is a spur track of which the initial 132 feet is owned and operated by the railroad. This spur then continues 1,619 feet south over tracks and land owned by the Stock Yards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned spur, about 793 feet long. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries including a packing plant operated by Koblenzer Brothers. This spur track affords the only rail connection between the railroads serving Cleveland and these four industries and three others located west of Sixty-fifth Street, all south of the main line.

On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for the construction of track 1619. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner

thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroads reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The above-mentioned agreement was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards tariff No. 5 applicable to livestock consigned through the Stock Yards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime, defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

From September 6, 1910, until January 1, 1930, complainant received its livestock at the Stock Yards and drove the stock across the street for immediate slaughter. Between January 1, 1930, and February 1, 1935, the New York Central delivered 1,161 carloads of livestock on complainant's siding, on which the Cleveland line-haul rates were charged under appropriate tariff provisions. Even during that period, complainant also received 2,260 carloads through the stock-

yards. In 1934 when the volume reached substantial proportions, the Stock Yards took steps which in effect prohibited the use of track 1619 for the transportation of livestock to others. This action was taken because Swift had been using that track to divert a substantial part of the Stock Yards' business of providing holding pens and other facilities enabling complainant to drive its livestock within the yards to the exit immediately across the street from complainant's plant.

As stated, the railroad transports all classes of freight, except livestock, to and from Swift's siding over track 1619. These other commodities are not competitive with livestock; and unlike livestock, these other commodities are not competitive with the Stock Yards' business. Moreover, I do not believe that the alleged preference of commodities other than livestock is undue under section 3 (1) because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The railroad switches livestock to sidings of three of Swift's allegedly preferred competitors in Cleveland, but those competitors, unlike Swift, reach the New York Central directly, and do not require the use of track 1619 or any other private track of the Stock Yards, as does Swift. Those competitors are not being preferred through use of that track. In fact, the railroad is prohibited from using track 1619 for livestock. No such prohibition exists with respect to the transportation of livestock to the plants of the three alleged competitors. It would not benefit Swift if that track was altogether withdrawn from use. Owing to this substantial dissimilarity of facts, the alleged preference of Swift's competitors, in my opinion, is not undue within the meaning of section 3 (1) of the act.

The evidence does not disclose any well-established or long-continued custom of free use of track 1619 for livestock. There was no public dedication of track 1619 by easement—instead the Stock Yards specifically reserved the right to terminate the sidetrack agreement. The Stock Yards has carefully guarded its control over the use of that track. So far as livestock traffic is concerned track 1619 clearly is a private track. The Commission has no authority to require the railroad to exercise a greater right in the track than it in fact possesses. The condemnation of private tracks for public use is a matter for decision by the courts and not by this Commission.

To require the railroad to acquire either tracks or trackage rights to handle livestock over track 1619 would amount in effect to requiring an extension of the railroad contrary to sections 1 (18) to 1 (22) which specifically provide that the Commission's authority shall not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks located or to be located wholly within one State.

Section 1 (9) relates to switch connections only and not to the extension of trackage rights over sidetracks. Compare *Cleveland, C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, at pages 408 and 409.

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909 the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. If that project had been consummated the use of track 1619 would not have been necessary in order for the New York Central to reach complainant's siding.

In view of the fact that track 1619 is owned by a private industry, not a common carrier by railroad, the Stock Yards is clearly within its legal rights in restricting the use of that track in such manner as to prevent Swift from interfering with the business of the Stock Yards.

It therefore follows that that track being privately owned and not having been condemned by any condemnation proceeding, the sole right of determining the use thereof remains in the Stock Yards. There is no jurisdiction in the Commission to require the Stock Yards to permit the New York Central to use the track for any purpose unless such use is agreeable to the Stock Yards.

In my opinion, the complaint should be dismissed.

I am authorized to state that COMMISSIONER PATTERSON joins in this expression.

SPLAWN, *Commissioner*, dissenting:

I dissent from the finding that there is a violation of section 3, because, in my opinion, the circumstances and conditions surrounding the transportation of livestock to Swift's private siding are not substantially similar to those surrounding the transportation of livestock to the private sidings of Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company. The plants of the latter companies are outside of the stockyards and are served by defendants without using tracks owned by the Stock Yards. In order to reach Swift's siding, defendants must use track 1619, which is owned by the Stock Yards Company, and whose use by defendants for the transportation of livestock has been prohibited. No such prohibition exists with respect to the transportation of livestock to the plants of the three companies above named. This difference in circumstances and conditions precludes a finding under section 3. Nor do I believe

that the preference that may be caused by the permission to use track 1619 for all traffic except livestock is undue because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The finding of a violation of section 1 (6) is apparently based upon the conclusion that the provision of the contract between the Stock Yards Company and the New York Central excepting livestock is a "penalty" provision which changes and nullifies the laws under which the New York Central operates and that, therefore, the provision is of no legal force and effect. I am unable to agree with the finding or with the conclusion upon which it is based. Track 1619 is owned by the Stock Yards Company and is constructed on its land within the stockyards property. It has not been dedicated to the public, and therefore its use may be restricted, in whole or in part, by its owner. There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use.

While section 1 (9) provides that the carrier shall operate switch connections with private sidetracks which may be constructed to connect with its railroad, there is no express language in the section requiring the operation of the sidetrack in instances where such operation is prevented by conditions not imposed by the carrier and beyond its control. This report does not contain conclusions of fact and findings on which it is possible to give complainant relief under section 1 (9).

COMMISSIONER ATTCHISON did not participate in the disposition of this proceeding.

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